

(2016) 01 DEL CK 0216

In the Delhi High Court

Case No : OMP Nos. 495, 496 & 497/2007

Dhruv Varma and Others

APPELLANT

Vs

ABN Amro Bank NV and Others

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Contract Act, 1872 — Section 2, Section 2(d), Section 2(e)
Evidence Act, 1872 — Section 91, Section 92

Citation : (2016) 3 ADDelhi 463 : (2016) 2 RAJ 36

Hon'ble Judges : Valmiki J. Mehta, J.

Bench : Single Bench

Advocate : Uttam Datt and Saksham Marwah, Advocates, for the Appellant;
Samrat K. Nigam, Abhimanyu Walia and Ankita Mahajan, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J. Mehta, J.—1. These three petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") impugning the Award of the Arbitrator dated 28.5.2007. The operative part of the Award reads as under:-

"ISSUE NO.11

Whether the respondents are entitled to recover any amount? If so, what amount, from the claimant?

69. As already held, the respondents are not entitled to recovery any amount from the claimant, as it was the respondents who committed default in terms of the Memorandum of Agreement and as already held the respondents are not entitled to claim any rent of the premises after 31st January, 2001 or mesne profits or damages. Thus, this issue is decided against the respondents.

70. I make the award as follows:-

I That the respondents shall pay to the claimant jointly and severally Rs. 1,11,39,358/- (one crore eleven lacs, thirty-nine thousand, three hundred and fifty eight only). The liability of the respondent No. 2, is restricted to only Rs. 1,07,11,500/- (one crore, seven lac, eleven thousand, five hundred only).

II That the respondents shall pay Rs. 2 lac (two lac) as cost of these proceedings to the claimant.

III That the respondents shall pay aforesaid amounts on or before 1st August, 2007 failing which the respondents shall pay interest @ 16% per annum from 1-6-2007 on the unpaid amount till payment.

IV That the counter claims raised by the respondent are rejected."

2. At the outset, counsel appearing for the petitioner in OMP No. 496/2007 states that Sh. Rattan Lal Varma who was the karta of the HUF has expired yesterday ie on 6.1.2016, however, that would not have any effect on OMP No. 496/2007 which is filed by an HUF concern and which is a separate legal entity as per Order XXX of the Code of Civil Procedure, 1908 (CPC) than the individual coparceners who constitute the HUF. For the record, it is also noted that the name of the respondent M/s. ABN Amro Bank NV has already been changed to Royal Bank of Scotland and which factual aspect is taken on record. Respondents will accordingly file the amended memo of parties within four weeks.

3. Petitioners in these OMPs represent the owners/landlords of the suit premises comprising a total area of 4,550 sq. ft. of the 9th floor on the building of Dr. Gopal Das Bhawan, Barakhamba Road, New Delhi. Petitioners/landlords let out the premises and the furniture/fixtures etc with respect to the premises to the respondent no.1-tenant. The lease deeds with respect to the total area of 4,550 sq. ft. are dated 12.10.1994 and were for a period of three years. Simultaneously, with the lease deeds, an Agreement of the same date i.e 12.10.1994 was entered into between the parties with respect to furniture and fixtures installed in the subject premises comprising of an area of 4550 sq. ft. Besides the rent and fixture charges payable for the tenanted premises, and which rental etc aspect is not material for disposal of the present petitions, the owners/landlords were also paid interest free security deposits of Rs. 82,12,500/- +20,25,500/- +34,12,500/- by the respondent no.1-tenant. Disputes and differences arose between the parties on account of the fact that respondent no.1 contended that returning of possession of the tenanted premises at the conclusion of the tenancy was to be simultaneously with petitioners refunding the security deposits but the petitioners contended otherwise. Respondent no.1 ultimately filed a suit in this Court being suit no. 2117/2001. In this suit, the Arbitrator was appointed by consent between the parties vide Order dated 23.9.2005. It is the Award by this Arbitrator being the Award dated 28.5.2007 with its operative portion as stated above, directing the recovery of amounts in favour of the respondent no.1 and against the petitioners alongwith interest which is impugned in these three petitions under Section 34 of

the Act.

4. The original lease deeds were for a period of three years with an option of extension of another period of three years and which was exercised. This extended period of three years would have come to an end on 31.10.2000, and hence the respondent no.1 who did not want to continue as a lessee wrote its letters dated 18.8.2000 and 1.9.2000 stating its intention to terminate the lease. Respondent no.1 wanted to terminate the lease, inasmuch as, respondent no.1 is stated to have taken on rent a premises in DLF Centre, Sansad Marg, New Delhi and lease deed in this regard was already executed on 16.8.2000. Correspondence thereafter ensued between the parties, and details of which would not be relevant for the purposes of the present judgment, however the final position which emerged was that the respondent no.1 was to be liable to pay the rental charges only till 31.1.2001 which was agreed as per the respondent no.1 to be a mutual date for the respondent no.1 to vacate the tenanted premises and for the petitioner to simultaneously refund the total amount of security deposits which the petitioners had received from the respondent no.1. Thereafter further events transpired whereby the respondent no.1 on 30.4.2001 issued five post dated cheques as detailed below:-

Out of the aforesaid five cheques, first two cheques were cleared but the remaining three cheques were dishonoured on presentation resulting in the respondent no.1 serving a Legal Notice upon the petitioners on 16.10.2001. Whereas the petitioners claimed that the respondent no.1 was liable to pay use and occupation charges/rent as also maintenance charges to the building society till respondent no.1 continued to occupy the premises (and also that the respondent no.1 was liable to pay enhanced house tax for such period) even though petitioners did not want to refund the security deposits at the time when the respondent no. 1 wanted to vacate the tenanted premises, however, the respondent no.1 claimed recovery of unpaid amounts of the security deposits lying with the petitioner alongwith accrued interest by stating that till security deposit amounts were paid back, the respondent no.1 was entitled to hold on to the possession without payment of rental and other related charges. This was the main dispute to be decided in the arbitration proceedings.

5. In the arbitration proceedings, the following issues were framed:

"I. Whether the Memorandum of Agreement dated 30th July, 2001 is non-est and not binding as alleged by the respondents?

II. In case Issue No. 1 is not proved, whether the Memorandum of Agreement dated 30th July, 2001 does not cover all the disputes pending between the parties at that point of time?

III. Whether the claim of refund of security deposit is barred by time?

IV. Whether it was agreed terms amongst the parties that the claimant was to first hand over the possession of the lease premises, furniture, fittings and

fixtures before claiming refund of the balance security amount?

V. Whether it was agreed amongst the parties that the possession of the lease premises and furniture, fittings and fixtures was to be handed over simultaneously with refund of security deposit?

VI. Whether delay in handing over possession of the said premises and furniture, fittings and fixtures occurred due to failure of the respondents to refund the security deposit and claimant has been ready and willing to hand over the possession of the same at all relevant time?

VII. Whether the counter claims/set off respondents are barred by limitation?

VIII. Whether the lease agreement and hire agreement continue to be in operation even after efflux of the period fixed? If so, with what effect?

IX. What is the effect of the claimant depositing the key of the premises in question with the High Court?

X. Whether the claimant is entitled to recover any amount? If so, what amount and from which of the respondents?

XI. Whether the respondents are entitled to recover any amount? If so, what amount, from the claimant?

XII. Whether either of the parties is entitled to claim any interest? If so, for what period and on what amount and at what rate?

XIII. Relief."

The discussion given below will show that this Court does not have to look into and decide each of the issues as aforesaid.

6. So far the finding of the Arbitrator in the impugned Award that the claims of the petitioner are time barred, this finding is not a legally correct finding, inasmuch as, there really was no counter claim of the petitioners as such in the arbitration proceedings because actually petitioners already had monies in their pockets being the security deposits paid by the respondent no.1 to the petitioners, and therefore, essentially the counter claim filed by the petitioners in the arbitration proceedings was in the nature of defence for adjustment of the amounts of security deposits which the respondent no.1 claimed in the arbitration proceedings against the claims of petitioners for charges for the tenanted premises payable by the respondent no. 1 till the petitioners did not receive the possession of the tenanted premises vide Walchandnagar Industries Ltd. Vs. Cement Corporation of India , 2012(2) Arbitration Law Reporter 219 (Delhi). The claim with respect to rental and other related charges of the petitioners are from 1.11.2000 onwards to 31.5.2004, inasmuch as, though the respondent no.1 in the suit filed by it in this Court had deposited in the court the keys of the premises when the suit was filed, but, the keys were released to the petitioner only later vide Order dated 14.5.2004 i.e possession of the subject

premises came to the petitioners only in May, 2004.

7. If one single main issue has to be crystallized for the decision of the present objections under Section 34 of the Act, the same would be whether the respondent no.1 was entitled to retain possession of the tenanted premises without payment of rent etc till the petitioners simultaneously refunded the amount of security deposits lying with the petitioners on the respondent no. 1 handing over possession to the petitioners i.e whether the return of possession and refund of security deposits were to be simultaneous actions of the parties.

8. In the opinion of this Court, the issue which is called for decision would stand decided in terms of the admitted Agreement/MOU dated 30.7.2001 entered into between the parties and since the terms of this MOU would be relevant for deciding the issue, I am reproducing the entire MOU Ex.C-18 as under:-

"MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT made this the 30th day of July 2001 BETWEEN.

1) ABN AMRO Bank N.V., a body corporate organized under the Laws of the Netherlands having one of its offices in India at DLF Centre, Sansad Marg, new Delhi - 110001 (hereinafter referred to as "ABN AMRO" with expression shall wherever the context admits mean and include its Successors and assigns) OF THE ONE PART; AND

(2) (i) R.L. Varma & Sons (HUF), A-25 New Friends Colony, New Delhi - 110025, through its Karta Mr. Ratna Lal Varma (hereinafter referred to as "R.L. Varma" which expression shall wherever the context admits mean and include each of its coparceners and their respective heirs, administrators, executors, successors and assigns).

(ii) Dhruv Property & Investment Pvt. Ltd. A-25, New Friends Colony, New Delhi - 110065 (hereinafter referred to as "Dhruv Properties" which expression shall wherever the context admits mean and include its successors and assigns).

OF THE OTHER PART

WHEREAS:-

A) ABN AMRO took on lease office space admeasuring 3650 sq. ft. on 9th floor of the building known as Gopal Das Bhawan, Barakhamba Road, New Delhi, from R.L. Varma pursuant to lease agreement dated 12.10.94, initially for a period of 3 years which was thereafter extended up to 31.10.2000.

B) ABN AMRO also entered into an agreement dated 12.10.94 with Dhruv Properties for hire of furniture and fittings initially for a period of 3 years which was extended up to 31.10.2000.

C) Pursuant to the aforesaid agreements and subsequent renewals thereof ABN AMRO provide interest free security deposits of Rs. 82,12,500/- in aggregate to

R.L. Varma, and Rs. 34,12,500/- in aggregate to Dhruv Properties.

D) On or about 18.8.2000, ABN AMRO intimated its intention to vacate the premises against refund of security deposits.

E) The sequence of events thereafter led to ABN AMRO causing a legal notice dated 15.6.01 to be served on R.L. Varma and Dhruv Properties claiming refund of security deposits together with interest @ 16% p.a. as also compensation for loss / damage said to have been suffered by ABN AMRO as set out therein.

F) R.L. Varma and Dhruv Properties caused replies dated 22.6.01 to be sent to the said legal notice controverting the claims of ABN AMRO on the grounds set out therein.

G) The Parties thereafter entered into negotiations and have arrived at an amicable settlement between them as set out hereinafter.

NOW THIS MEMORANDUM WITNESSETH AND THE PARTIES MUTUALLY AGREE AND DECLARE AS UNDER:-

1. R.L. Varma and Dhruv Properties agree and firmly bind themselves to refund and pay to ABN AMRO the outstanding balance of security deposits lying with them, namely, Rs. 21,42,951.50 and Rs. 34,12,500 aggregating to Rs. 55,55,451.50. In addition thereto R.L. Varma and Dhruv Properties shall pay to ABN AMRO interest @ 13.5% p.a. on the amounts and for the period set out in the Appendix I hereto.

2. R.L. Varma and Dhruv Properties will pay to ABN AMRO

(i) a sum of Rs. 60,00,000 (Rs. Sixty lacs, comprising Rs. 55,55,41.50 being the aggregate of the balance principal amount of deposits and a sum of Rs. 4,44,548.50 as per payment towards interest, on or before 05.08.01; and

(ii) The balance amount of Rs. 2,35,719.74 due towards interest on or before 31.08.01 for which a post dated cheque shall be given on or before 05.08.01.

Computation of interest up to 05.08.01 is appended hereto as Appendix I. Failure to pay the aforesaid amounts by the due dates mentioned above will render R.L. Varma and Dhruv Properties liable to pay additional interest on the unpaid amount @ 16% p.a. for the period of delay.

3. ABN AMRO shall vacate the demised premises within a period of 7 (seven) days from realisation of the first payment of Rs. 60 lacs provided for in Clause 2 herein above."

(emphasis added)

9. As per Sections 91 and 92 of the Indian Evidence Act, 1872 once a written contract is entered into between the parties, only that contract has to be seen to decide the aspects which are the subject matter of the written agreement. As per Section 92 of the Indian Evidence Act, no parole evidence can be led to in any

manner contradict or vary or alter etc the terms of the written agreement between the parties. The issue to be looked into is that whether the MOU dated 30.7.2001 determines the issue of entitlement of respondent no.1 to retain possession of the suit premises without making payment of any rental or other related charges till the petitioners refund the security deposits with them or that the respondent no.1 continues to be liable to pay rent for use and occupation alongwith all other related charges till the respondent no.1 was in possession of the premises, even though the petitioners do not refund the security deposit amounts. In view of Sections 91 and 92 of the Indian Evidence Act, all correspondences as also agreements etc which are of dates prior to the date of MOU dated 30.7.2001, to the extent that they are the subject matters of MOU dated 30.7.2001, all such aspects necessarily merge and achieve finality as per the terms contained in the MOU dated 30.7.2001. As per Sections 91 and 92 of the Indian Evidence Act except the terms of the MOU nothing else can be looked into to determine the entitlement of the respective parties as to whether the respondent no.1 can continue in possession without payment of rental and other related charges till security deposits are refunded or whether there was entitlement of the petitioners to claim payment of rental and other related charges without refund of the security deposits simply because the respondent no.1 has possession of the suit premises.

10. (i) In my opinion the issue to be decided is answered when we refer to para 3 of the MOU dated 30.7.2001 and which in clear terms specifically provides that only on the amount of Rs. 60 lacs; which was also the subject matter of para 2(i) of the MOU dated 30.7.2001; being paid by the petitioners to the respondent no.1, it is at that stage only that the respondent no.1 was to hand over the possession of the premises to the petitioners and not before. In effect therefore the MOU removed any doubt in this regard by clarifying that handing over of possession by the respondent no.1 to the petitioner was necessarily linked to the petitioner refunding the security deposit amount of Rs. 60 lacs alongwith interest as stated in para 2(i) of the MOU dated 30.7.2001.

(ii) I cannot agree with the argument urged on behalf of the petitioners that payment/refund of security deposit is not in any manner linked to return of possession of the suit premises by the respondent no.1 to the petitioners because para 3 of the MOU dated 30.7.2001 makes it crystal clear that handing over of possession is only when the payment of Rs. 60 lacs is made by the petitioners to the respondent no.1. Implied thus in para 3 of the MOU is the entitlement of the respondent no.1 to retain the possession of the premises without payment of any rental or other related charges till the petitioners pay the amount of Rs. 60 lacs; with the fact that the balance amount of Rs. 2,35,719.74/- which was payable by 31.8.2001 was not linked to the handing over of possession by the respondent no.1 to the petitioners.

11. The issue to be decided by this Court can also be looked at from another angle and which is that the provision of Section 34 of the Act does not empower

this Court to interfere with one possible and plausible finding/conclusion of the arbitrator which the arbitrator has arrived at on the interpretation of a document/ evidence on record in the arbitration proceedings. Arbitrator has arrived at one possible and plausible interpretation of the terms of the MOU dated 30.7.2001 that the respondent no.1 was not liable to hand over possession till respondent no.1 received payment of the amount of Rs. 60 lacs and respondent no.1, till then would not be liable to make payment of rental and other related charges. As already stated above, the claims of the petitioners are not being held as time barred as has been held by the Arbitrator in view of the judgment of the Division Bench of this Court in the case of Walchandnagar Industries Ltd. (supra), however, even if the claims are not time barred, these claims are not payable to the petitioners with respect to the rental and other related charges for the suit premises as all the rights of the parties stood crystallized as per the terms of the MOU dated 30.7.2001 and which does not require the respondent no.1 to pay any rental and other related charges of the suit/tenanted premises to the petitioners till the amount of Rs. 60 lacs is paid by the petitioners to the respondent no.1 in terms of the MOU dated 30.7.2001. Therefore, even on setting aside the findings of the Arbitrator with respect to the issue of limitation, yet the other findings of the Arbitrator are not found in any manner to be perverse or illegal for this Court to interfere with the conclusion of the Arbitrator in the Award which holds that the respondent no.1 was entitled to continue to hold on to the possession of the suit premises without payment of rental and other related charges unless the petitioners paid the security deposits lying with the petitioners of an amount of Rs. 60 lacs.

12. (i) Learned counsel for the petitioners finally argued that the Agreement/ MOU dated 30.7.2001 was without consideration and hence invalid. This aspect has been correctly dealt with in detail in the Award while discussing issue no.1, however in addition to the said discussion and conclusion of the Arbitrator which is not in any manner illegal or perverse, so as to sustain that conclusion we can also refer to the definition of consideration under Section 2(d) of the Indian Contract Act, 1872. As per this definition an act or an abstinence or a compromise is a valid consideration ie a monetary amount or a particular and a specific type of consideration is not the only consideration which is envisaged as a consideration under law. Section 2(d) of the Indian Contract Act,1872 reads as under:-

"Section 2. Interpretation -clause

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(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise"

(underlining added)

(ii) An agreement is defined as a set of reciprocal promises as per Section 2(e) of the Indian Contract Act and it cannot be doubted that the MOU dated 30.7.2001 does contain reciprocal promises and hence is an agreement supported by the consideration. A reciprocal promise given by one party is a consideration for the reciprocal promise of the other party resulting in a set of reciprocal promises becoming an agreement/contract. The argument of the petitioners that there was no consideration is thus a flawed argument and is therefore rejected.

13. The petitions under Section 34 of the Arbitration and Conciliation Act, 1996 are therefore dismissed leaving the parties to bear their own costs.